

REMARKS

The present Amendment is in response to the non-final Office Action mailed August 24, 2004 in the above-identified application. Enclosed herewith is a Petition requesting a three-month extension of time for resetting the deadline for responding to the Office Action from November 24, 2004 to and including February 24, 2005.

In the Office Action, the Examiner objected to the disclosure as having the informalities identified in paragraph 1 of the Office Action. In response, Applicants have amended the "Cross-Reference To Related Applications" section of the specification in order to update the information therein. In view of the above noted amendment to the specification, Applicants respectfully assert that the specification now satisfies all of the requirements of the M.P.E.P.

The Examiner rejected claims 1, 4-5, 7 and 10-12 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 3, 4, 7, 9, 10, 13, 16, 17 and 20 of copending U.S. Patent Application Serial No. 10/642,526. The Examiner also rejected claims 1-12 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 20-23 of U.S. Patent No. 6,764,515. In response, Applicants enclose herewith Terminal Disclaimers related to U.S. Patent Application Serial No. 10/642,526 and U.S. Patent No. 6,764,515.

The Examiner rejected claims 1-12 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,989,291 to Ralph et al. Referring to Figures 3a and 4 thereof, Ralph discloses a spacer device including top and bottom plate members 100a, 100b. The device is designed for positioning between adjacent vertebral bodies. The top and bottom plate members include respective substantially flat portions 102a, 102b, which seat against opposing bone surfaces. Each of the plates also

includes a porous coating 104a, 104b into which the bone of the vertebral body can grow. The top and bottom plate members 100a, 100b include a second peripheral skirt comprised of an offset flange 108a, 108b.

Referring to Figure 4, the top and bottom plate members 100a, 100b are joined by a circumferential wall 120 that is resilient and which prevents vessels and tissues from entering an interior region of the device. The resilient wall 120 is made of a porous fabric or a semi-impermeable elastomeric material. In response, Applicants respectfully assert that claim 1 is unanticipated by Ralph because the reference neither discloses nor suggests an intervertebral spacer device that includes first and second plates with each plate "having an external plate surface adapted to seat against an opposing bone surface, . . . at least one of the external plate surfaces having a deflectable mesh thereon, wherein said deflectable mesh is deformable for seating against one of the opposing bone surfaces." Clearly, Ralph does not disclose a deflectable mesh that is provided on an external plate surface that seats against an opposing bone surface. Ralph's deflectable, circumferential wall 120 is not adapted to seat "against an opposing bone surface" as required by claim 1 of the present application. For all of these reasons, claim 1 is unanticipated by Ralph and is otherwise allowable. Claims 2-3 and 5 are unanticipated, *inter alia*, by virtue of their dependence from claim 1, which is unanticipated for the reason set forth above.

Independent claim 7 is unanticipated by the Ralph '291 patent for essentially the same reasons set forth above with respect to claim 1. Clearly, Ralph does not disclose "a deflectable, convex porous surface" that is provided on "an external plate surface adapted to seat against an opposing bone surface." Ralph also neither discloses nor suggests that "the deflectable convex porous surface is deformable for seating against one of the opposing bone surfaces." For all of these

reasons, claim 7 is unanticipated by Ralph and is otherwise allowable. Claims 8-9 and 11-12 are unanticipated, *inter alia*, by virtue of their dependence from claim 7, which is unanticipated for the reasons set forth above.

The Examiner also rejected claims 7-9 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,425,773 to Boyd *et al.* Referring to Figures 5 and 6 thereof, Boyd discloses an intervertebral spacer device 110 having an ellipsoid-shaped ball 146 and socket 126. The top and bottom exterior faces of the device are convex. At column 9, line 52 to column 10, line 2, Boyd describes the exterior surface of the plates as having a porous coating. In response to the Examiner's rejection, Applicants respectfully assert that Boyd does not teach a device having first and second plate members with "at least one of the external plate surfaces having a deflectable, convex porous surface thereon, wherein the deflectable convex porous surface is deformable for seating against one of the opposing bone surfaces," as required by claim 7. Clearly, Boyd does not teach or suggest a "deflectable, convex porous surface" being provided over the external plate surface of an implant member that seats against an opposing bone surface. For all of these reasons, claim 7 is unanticipated by Boyd and is otherwise allowable. Claims 8 and 9 are unanticipated, *inter alia*, by virtue of their dependence on claim 7, which is unanticipated for the reasons set forth above.

The Examiner also rejected claims 1-12 under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 6,579,231 to Gordon *et al.* Referring to Figure 1 thereof Gordon discloses a disk prosthesis having top and bottom surfaces that are convex. The top and bottom surfaces may have a coating on at least one surface to promote bone fixation. The coating may include ceramic beads, wire mesh or other types of ceramics. Column 4 lines 28-35. In the embodiment shown in Figures 6 and 7, the prosthesis includes a support ball 18 that is housed in a cavity

24 by an upper bearing cap 27 and a lower bearing cap 28. In response to the Examiner's rejection of claim 1, Applicants respectfully assert that Gordon neither disclose nor suggests a spacer devices including first and second plate members, "each having an external plate surface adapted to seat against an opposing bone surface,. . . at least one of the external plate surfaces having a deflectable mesh thereon, wherein said deflectable mesh is deformable for seating against one of the opposing bone surfaces." For the above reasons, claim 1 is unanticipated by Gordon and is otherwise allowable. Claims 2-3 and 5 are unanticipated, *inter alia*, by virtue of their dependence from claim 1, which is unanticipated for the reasons set forth above.

Independent claim 7 is unanticipated by Gordon because the cited reference neither discloses nor suggests an intervertebral spacer device including first and second plate members, "each having an external plate surface adapted to seat against an opposing bone surface,. . . at least one of the external plate surfaces having a deflectable, convex porous surface thereon, wherein the deflectable convex porous surface is deformable for seating against one of the opposing bone surfaces." Claims 8-9 and 11-12 are unanticipated, *inter alia*, by virtue of their dependence on claim 7, which is unanticipated for the reasons set forth above.

Applicants have amended claims 1 and 7 as indicated above. Support for the amendments is found in the originally filed specification and introduces no new matter. Specifically, support for the amendments of claims 1 and 7 is found, *inter alia*, in paragraph 27 of the specification.

In view of the above, each of the presently pending claims in this application is believed to be in immediate condition for allowance. Accordingly, the Examiner is

respectfully requested to withdrawn the outstanding rejection of the claims and to pass this application to issue.

If, however, for any reason the Examiner does not believe that such action can be taken at this time, it is respectfully requested that the Examiner telephone Applicants' attorney at 908-654-5000 in order to overcome any additional objections which the Examiner might have.

If there are any additional charges in connection with this requested Amendment, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

Dated: February 23, 2005

Respectfully submitted,

By 

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